Tentative Rulings for December 18, 2013
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

13CECG01858 ***Nolte v. Nolte Sheet Metal Inc.*** **(Dept. 502)**

09CECG04134 ***Thao v. Chevy Chase Bank*** **(Dept. 503)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

13CECG02491 ***Von Werlhof v. Torrence*** **(Dept. 403) [Hearing on demurrer is continued to January 14, 2014, at 3:30 p.m. in Dept. 403]**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(6)

Tentative Ruling

Re: ***Phillips v. Amcord, Inc.***
Superior Court Case No.: 12CECG04055

Hearing Date: December 18, 2013 (**Dept. 402**)

Motions: (1) By Defendant Carrier Corporation Incorporated for summary judgment or, in the alternative, summary adjudication;

(2) By Defendant Calaveras Asbestos Ltd., for summary judgment or, in the alternative, summary adjudication;

(3) By Defendant Rheem Manufacturing Company for summary judgment or, in the alternative, summary adjudication;

Tentative Ruling:

The Court intends to continue all pending motions for summary judgment and/or summary adjudication to March 6, 2014, at 3:30 p.m., in Dept. 402. Tentative rulings on all pending motions for summary judgment being continued will issue normally on March 5, 2014. Oral argument on the motion of Pneumo Abex, LLC, currently set for Thursday, December 19, 2013, will go forward. Trial will be continued to April 14, 2014, and trial readiness to April 11, 2014. The court finds good cause to continue the trial sua sponte based upon the volume of pleadings being filed and the resources available to the court to handle same. The continuance of trial will not affect any discovery or other trial deadlines.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/17/2013.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Cubre et al. v. Mason***, Superior Court Case No. 13CECG03695

Hearing Date: **December 18, 2013 (Dept. 402)**

Motion: Unopposed Petition to Release Property from Mechanic's Lien

Tentative Ruling:

To grant and award petitioner $1,080 in attorney's fees. (Civ. Code § 8482 et seq.)

Explanation:

Petitioner has complied with all requirements of Civ. Code § 8484. Adequate notice has been given as required by Civ. Code § 8486, and respondent has filed no opposition. The petition should therefore be granted, and petitioner awarded reasonable attorney's fees. (Civ. Code § 8488(c).)

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 12/17/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(5) **Tentative Ruling**

Re: ***Standard et al. v. Placer Title Company et al.***
Superior Court Case No. 13CECG01932

Hearing Date: December 18, 2013 **(Dept. 403)**

Motions: Demurrers and Motions to Strike by Defendants Placer Title and Westcor Title

Tentative Ruling:

To sustain the special demurrers for uncertainty with leave to amend. The general demurrers and motions to strike are rendered moot. An Amended Complaint is to be filed within 20 days of notice of the ruling. Notice runs from the date the Minute Order is mailed. All new allegations in the first amended complaint are to be set in **boldface** type

Explanation:

Title Insurance in General

"Title insurance" is statutorily defined as "insuring, guaranteeing or indemnifying owners of real or personal property or the holders of liens or encumbrances thereon or others interested therein **against** loss or damage suffered by reason of: (a) [l]iens or encumbrances on, or defects in the title to said property; (b) [i]nvalidity or unenforceability of any liens or encumbrances thereon; or (c) [i]ncorrectness of searches relating to the title to real or personal property." [Ins.C. § 12340.1; *First American Title Ins. Co. v. XWarehouse Lending Corp*. (2009) 177 Cal.App.4th 106, 113; see also *Dollinger DeAnza Assocs. v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1145—title insurance insures against losses resulting from differences between actual title and record title as of date title is insured]

In essence, a title insurance policy is a contract to indemnify persons with an interest in real property (the insureds) against losses incurred because of a defect in the status of title or liens or encumbrances that may affect the title as *reported* by the title company when the policy is issued. [See *Dollinger DeAnza Assocs. v. Chicago Title Ins. Co.*, supra, 199 Cal.App.4th at 1145--title insurer does not *guarantee title but* agrees only to pay losses resulting from, or to cause removal of, cloud on title within policy provisions; *Siegel v. Fidelity Nat'l Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1191—title "policy expressly provides merely that the insurer will pay any loss or damage suffered by the insured from an omitted defect not excluded by the terms of the policy" (internal quotes omitted); *Radian Guar., Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280, 1293—"insuring . . . against risk of loss associated with an undisclosed senior lien falls squarely within the statutory definition of title insurance."

The fundamental purpose of title insurance companies is to *search* the public land records, *report* their findings as to the status of title, and provide an *indemnity policy* insuring their findings. Title insurance thus protects against the possible existence of liens and other items not found in the public records search or disclosed in a preliminary report (below). [*Radian Guar., Inc. v. Garamendi*, supra, 127 Cal.App.4th at 1289; *Siegel v. Fidelity Nat'l Title Ins. Co.* (1996) 46 Cal.App.4th 1181, 1191; see *Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 41—"A title insurer issues title insurance on the basis of ... the quality of its own investigation into ... public records concerning the status of the title ... The risk is therefore largely within the control of the insurer"]

As the moving party contends, a title policy has insured title only in the condition *stated in the preliminary report*—i.e., only as to defects, liens or encumbrances in *existence as of the date the policy takes effect*. Title insurance generally does not insure against future events: "It is not forward looking. It insures against losses resulting from differences between actual title and the record of title as of the date title is insured." [*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 41; *Magna Enterprises, Inc. v. Fidelity Nat'l Title Ins. Co.* (2002) 104 Cal.App.4th 122, 126] Thus, title insurance typically indemnifies the insured only from matters affecting or burdening title *at the time the policy is issued*. With a conventional title policy, "[t]here is *no implied agreement to go beyond the conditions existing at the time the policy is issued and to assume a general liability to indemnify against future encumbrances*." [*Rosen v. Nations Title Ins. Co.* (1997) 56 Cal.App.4th 1489, 1499 (emphasis in original; internal quotes and citation omitted); see *Radian Guar., Inc. v. Garamendi* (2005) 127 Cal.App.4th 1280, 1291 (contrasting "backward-looking" risk insured by title insurance with "forward-looking" risk insured by mortgage guaranty insurance).

The Complaint at Bench

As the demurring parties state, the first and second causes of action are alleged against Fresno Escrow only. That entity has been dismissed. As a result, only the third and fourth causes of action alleging breach of written contract and breach of the covenant of good faith and fair dealing are at issue.

It is noted that the Plaintiffs set forth at ¶¶ 8-24 a section entitled "Preliminary Allegations". Then, these 17 paragraphs and the initial 7 paragraphs are incorporated into each of the causes of action, like a "chain letter". See ¶¶ 25, 32, 39, and 50. This type of "chain letter" pleading has been criticized for creating ambiguity and redundancy. See *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1179 and *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 605.

In particular, Plaintiffs re-incorporated by reference the defects and encumbrances set forth at ¶¶ 15-16 into the third and fourth causes of action. These defects and encumbrances form the gravamen of the action against the remaining Defendants. Yet, these defects and encumbrances are not set forth in any detail and it is impossible to discern whether they fall within the "Exclusions from Coverage" set forth at page 2 of the policy or within the "Exceptions from Coverage" attached as

Schedule B to the Policy. In addition, it is impossible to ascertain which defects and encumbrances attach to the "third address" that the Plaintiffs claim was not disclosed to them.

This is important because "face of the complaint" includes matters shown in *exhibits* attached to the complaint and incorporated by reference; or in a *superseded complaint* in the same action. [*Frantz v. Blackwell* (1987) 189 CA3d 91, 94, 234 CR 178, 179–180; *Barnett v. Fireman's Fund Ins. Co.* (2001) 90 CA4th 500, 505, 108 CR2d 657, 659—"we rely on and accept as true the contents of the exhibits and treat as surplusage the pleader's allegations as to the legal effect of the exhibits"; *George v. Automobile Club of Southern Calif.* (2011) 201 CA4th 1112, 1130, 135 CR3d 480, 492—"trial court was not required to credit plaintiff's allegations that extrinsic evidence 'renders the insurance contract at issue here ambiguous' " where language of policy attached to complaint showed otherwise]

In the instant case, the Plaintiffs have pleaded their case in very general terms. Whether the claim is covered is unclear. Before the court determines whether causes of action for "breach of contact" or "breach of covenant of good faith and fair dealing" are stated, more facts are needed. Therefore, at this stage, the special demurrers for uncertainty will be sustained with leave to amend. The general demurrers and the motions to strike are rendered moot.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 12/17/2013.
(Judge's initials) (Date)

Tentative Rulings for Department 501

(17) **Tentative Ruling**

Re: ***Northwest Trustee Services, Inc. v. Testate and Intestate Successors of Roger W. Janssen et al.***
Court Case No. 13CECG01990

Hearing Date: December 18, 2013 (Dept. 501)

Motion: Motion to Interplead Funds

Tentative Ruling:

To deny without prejudice.

Explanation:

When a person may be subject to conflicting claims for money or property, the person may bring an interpleader action to compel the claimants to litigate their claims among themselves." (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1122.) The stakeholder has the right to interplead the disputed funds on receipt of conflicting demands. It owes no duty to attempt to resolve the dispute between warring claimants before incurring the expense of interpleader. (*Cantu v. Resolution Trust Corp*. (1992) 4 Cal.App.4th 857, 876.)

Code of Civil Procedure section 386, subdivision (b), applies to "[a]ny person, firm, corporation, association or other entity against whom double or multiple claims are made, or may be made, by two or more persons which are such that they may give rise to double or multiple liability." (Code Civ. Proc. § 386, subd., (b).) These entities "may either file a verified cross-complaint in interpleader" or "may bring an action against the claimants to compel them to interplead and litigate their several claims." (*Ibid*.) In either case the entity may "apply to the court upon notice to such parties for an order to deliver such money or property or such portion thereof to such person as the court shall direct." (*Ibid*.) The deposit of the disputed portion of the money with the clerk of the court cuts of the right to further interest or damages for the retention of the funds. (Code Civ. Proc. § 386, subd. (c).)

The plaintiff has filed a complaint for interpleader in the first instance,

The matter of the "affidavit" showing "that conflicting demands have been made," is problematic. These facts were presumably to be found in one of the declarations of Mathew Van Fleet. The caption of the motion lists a "Declaration of Mathew Van Fleet" as one of the documents attached to the Notice of Motion. Nevertheless no such document is found between the Notice of Motion and Proof of Service. There is a "Supplemental Declaration of Mathew Van Fleet …" but it concerns attorney's fees not the propriety of the claims on the fund. The Court's internal

docketing system notes a third declaration, also called the "Supplemental declaration of Mathew Van Fleet in Support of Motion for Order of Deposit …" filed on the same day as the above described documents, but it is not in the file. If plaintiff's counsel can come to court with a file stamped copy of an affidavit which meets the requirement showing conflicting demands have been made the motion may be granted, otherwise the motion will be denied.

Pursuant to California Rules of Court, rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: M.B. Smith on 12/17/13.
(Judge's initials) (Date)

Tentative Rulings for Department 502

Tentative Ruling

(24)

Re: ***Campbell, et al. v. Greyhound, et al. [and related/consolidated actions*]**
Court Case No. **10CECG03185 [lead case]**

Hearing Date: **December 18, 2013 (Dept. 502)**

Motion: Demurrer of State of California's Department of Transportation (CalTrans) to Cross-Complaint of Greyhound Lines, Inc. (Greyhound) in Case #11CECG03230 (consolidated with Case #10CECG03185)

Tentative Ruling:

To sustain the demurrer to Greyhound's cross-complaint filed in Case #11CECG03230, without leave to amend. (Code Civ. Proc. § 430.10, Subd. (e); Gov. Code §§ 945.4, 911.2.) CalTrans is directed to submit to this court, within 7 days of service of the minute order, a proposed judgment dismissing said cross-complaint.

Explanation:

Greyhound has filed a Notice of Non-Opposition to this motion, conceding the points raised on demurrer. It failed to timely file its claim with the Victim Compensation and Government Claims Board pursuant to Government Code Sections 945.4 and 911.2. Therefore, its suit against CalTrans may not be brought, as this failure is "fatal to the cause of action." (*Pacific Tel. & Tel. Co. v. County of Riverside* (1980) 106 Cal.App.3d 183, 188, citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 454.)

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: **DSB** (Judge's initials) **on** **12-16-13** (Date).

Tentative Ruling

(24)

Re: ***L.J. Bishoff, et al. v. Gail Bishoff, et al.***
Court Case No. 12CECG03007

Hearing Date: **December 18, 2013 (Dept. 502)**

Motion: Defendants' Motion to Compel Further Responses to (1) Form Interrogatories – General (Set One); (2) Form Interrogatories – Employment (Set One); (3) Special Interrogatories (Set One); (4) Requests for Admissions (Set One); (5) Inspection Demand (Set One); (6) Inspection of Documents; and (7) for monetary sanctions.

Tentative Ruling:

To deny, as untimely.

Explanation:

A notice of motion to compel further response must be served within 45 days after the responses in question, or any supplemental responses, were served (extended under Code Civ. Proc. §§ 1010.6, Subd. (a)(4), 1013 if served by mail, overnight delivery, fax or electronically), *unless the parties agree* ***in writing*** *to extend the time*. (Code Civ. Proc. § 2030.300, Subd. (c)—Interrogatories; Code Civ. Proc. § 2033.290, Subd. (c)—Admissions; Code Civ. Proc. § 2031.310, Subd. (c)—Inspection Demands.) Delaying in filing the motion beyond the 45-day time limit waives the right to compel a further response to the discovery. This time is mandatory and jurisdictional, and thus the court has no authority to grant a late motion. (*Sexton v. Superior Court* (1997) 58 Cal.App.4th 1403, 1409.)

The 45-day deadline runs from the date the verified response is served, not from the date originally set for production or inspection. (See, *e.g.,* Code Civ. Proc. § 2031.310, Subd. (c), re document demands; *Standon Co. v. Superior Court* (1990) 225 Cal.App.3d 898, 901.) **This meant that Defendant's original deadline for filing this motion was August 2, 2013.**

The deadline may be extended by *written* stipulation of the parties. (Code sections cited *supra*). Here, however, there was no such extension. The 15-day extension defendant granted plaintiffs to provide responses to the meet and confer correspondence did not extend defendant's time to file this motion, since this issue is not mentioned at all in counsel's email correspondence (Ex. F to Declaration of Amanda S. Patterson). There is no indication of any stipulation by plaintiffs to extend the filing deadline.

The time for filing was tolled during the time in which the moving party was complying with Local Rule 2.1.17. (Fresno County Superior Court Local Rule 2.1.17, Subd. A.4.) Here, however, defendant sought a Pretrial Discovery Conference on August 1,

2013, which was just *one day before her 45-day deadline*. The court issued its order allowing her to file her motion on September 13, 2013, which means that the tolling period was 43 days. But this did not mean that defendant had 43 days from September 13, 2013 to file her motion, as she argues in her Reply brief. Tolling is merely a temporary suspension in the running of a deadline. "Tolling may be analogized to a clock that is stopped and then restarted. *Whatever period of time that remained when the clock is stopped is available when the clock is restarted*, that is, when the tolling period has ended." (*Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 674 (emphasis added).) The court calculates that defendant's new deadline for filing her motion, with the tolling taken into account, was **September 19, 2013**, calculated as follows: 43 days from the original deadline of August 2 is September 14, plus 5 days' extension from the time of mailing the order, pursuant to Code of Civil Procedure Sections 1010.6, Subd. (a)(4) and 1013. However, defendant filed her motion on October 25, 2013. Thus, this motion is untimely.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 12-16-13.
(Judge's initials) (Date)

03

Tentative Ruling

Re: ***Alvarez v. Line***
Case No. 13CECG02237

Hearing Date: December 18th, 2013 (Dept. 502)

Motion: Plaintiff/Cross-Defendant's Demurrer to Cross-Complaint

Tentative Ruling:

To sustain the demurrer to the first, second, and third cross-claims, for failure to state facts sufficient to constitute a cause of action and uncertainty, with leave to amend. (Code Civ. Proc. §§ 430.10(e), (f).) Defendant/cross-complainant shall serve and file his first amended cross-complaint within ten days of the date of service of this order. All new allegations shall be in **boldface**.

Explanation:

First Cause of Action: The first cause of action attempts to state a claim for breach of contract. However, defendant/cross-complainant has not alleged facts to support the required elements of a breach of contract claim. The elements of a breach of contract claim are (1) a contract between the parties, (2) performance or an excuse for nonperformance on the part of the plaintiff, (3) breach on the part of the defendant, and (4) resulting damages. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) Also, in order to properly allege a claim for breach of a written contract, the plaintiff must either attach a copy of the written agreement to the complaint, or allege the essential terms of the agreement according to their legal effect. (*Hayter Trucking, Inc. v. Shell Western E&P, Inc*. (1993) 18 Cal.App.4th 1, 18.)

Here, defendant does not attach a copy of the alleged written agreement to the cross-complaint, nor does he allege the essential terms of the agreement according to their legal effect. He only alleges that plaintiff agreed in June of 2011 to act as a real estate broker and agent for the purchase of a property by defendant, as well as acting as property manager for defendant. (Cross-Complaint, First Cause of Action, p. 3, ¶ BC-1.) However, he alleges no details about the terms of the relationship, the consideration for the bargain, or any other specifics about the alleged contract.

Also, defendant has not alleged any facts showing how plaintiff breached the agreement, or how the breach caused him any actual damage. He alleges that plaintiff breached the agreement by failing to act in defendant's best interest, failing to conduct herself in good faith and failing to follow laws and regulations governing real estate professionals "in regard to self-dealing and dealings with a client." (*Id*. at ¶ BC-2.) Defendant claims that these breaches caused him "financial losses of an unknown extent", as well as forcing him to hire an attorney to defend his rights in connection with the breach of contract by plaintiff. (*Id*. at ¶ BC-4.)

However, these allegations are too vague and uncertain to show a breach of contract by plaintiff, or any resulting damages. It is unclear how plaintiff failed to act in the best interest of defendant, how she violated laws and regulations regarding real estate professionals, which laws and regulations she violated, or how she engaged in self-dealing. It is also unclear how plaintiff's alleged breaches caused defendant damages, or exactly what type of damages he suffered. Vague allegations of "financial losses of an unknown extent" are too uncertain to show actual damages. What type of "financial losses" did defendant suffer? How did plaintiff cause those losses? There are no facts that would tend to show that plaintiff's conduct caused any harm to defendant.

Nor can defendant normally claim attorney's fees as an item of damages for a breach of contract. Generally, in the absence of a special agreement or statute, each party must bear their own attorney's fees. (Code Civ. Proc. § 1021.) Defendant has not alleged any contractual or statutory basis for an award of attorney's fees here. Also, while there is an exception to the general rule where a party, through the tort of another, has been required to hire an attorney to protect his interests by bringing or defending an action against a third person (*Prentice v. North American Title Guaranty Corp*. (1963) 59 Cal.2d 618, 620), this exception does not appear to apply here, as defendant has not had to sue a third person. Therefore, the defendant has failed to allege any facts showing that he suffered any damage from plaintiff's alleged breach of contract, and the first cause of action fails to state a claim, as well as being uncertain.

Second Cause of Action: The elements of a fraud cause of action are (1) a misrepresentation by defendant, (2) intent to deceive, (3) knowledge of falsity, (4) reasonably reliance on the part of plaintiff, and (5) resulting damages. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) The plaintiff must plead specific facts to support each element of a fraud claim. (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) "This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.' [Citation.]" (*Ibid*.)

Here, defendant alleges that plaintiff misrepresented on June 11th, 2011 that she would act as his real estate broker and agent in regard to the purchase of the real property, and that she would act in his best financial interests and she would use the standard of fiduciary care required of real estate brokers and agents in California. (Cross-Complaint, p. 4, FR-2 a.) In reality, the representations were false because she never intended to act in the best financial interests of her client, defendant, but instead intended to make a commission for acting as his agent and property manager, and then also to take his real estate profits for herself. (*Id*. at ¶ FR-2 b.) She also failed to disclose her real intentions, and failed to disclose the fact that she had been investigated and sanctioned by the California Department of real Estate. (*Id*. at ¶ FR-3 a.)

Defendant further alleges that plaintiff agreed to move into the house purchased by defendant and to pay fair rental value of $800 per month to defendant, as well as to manage his house and take good care of it, thus acting as real estate

agent, property manager, and tenant for the house. (*Id*. at p. 5, ¶ FR-4 a.) She also agreed that, when defendant decided to sell the house, she would move out and help him sell it for a profit. (*Ibid*.)

Defendant relied on plaintiff's misrepresentations and allowed her to move into the house, but she then stopped making monthly payments as agreed, and has refused to move out of the house after receiving notice. Instead, she has filed a lawsuit against defendant and falsely claimed that she owns the house. (*Id*. at ¶ FR-5.) Defendant was damaged as a result of lost income from the unpaid rent, as well has having to pay the mortgage while plaintiff lives there for free. (*Id*. at ¶ FR-6.) Plaintiff also "may have done damage to his house", and defendant has been forced to hire an attorney and engage in litigation to recover his house and protect his rights. (*Ibid*.)

These allegations are too vague and uncertain to state a claim for fraud. While defendant does allege the specific date of the first misrepresentation, June 11th, 2011, he has not alleged any facts showing that plaintiff's misrepresentations regarding the purchase of the house induced him to act in a way that resulted in any harm to him. The only alleged harm to defendant is the fact that plaintiff is living in his house rent-free, and defendant has had to continue paying the mortgage and expenses for the house while plaintiff lives there. Yet defendant has not alleged that plaintiff's false promises to act as his real estate broker, agent, and property manager caused him any actual harm. In fact, it appears from the allegations of the cross-complaint that plaintiff kept her promise to act as broker and agent for the purchase of the house.

The failure to pay rent is related to the second promise, in which she promised to pay $800 in rent in return for staying in the home. (Cross-Complaint, FR-4 a.) This allegation does at least establish some form of damage to defendant, although the damages related to harm that plaintiff "may have done to the house" are too vague and speculative to support a fraud claim. The damages resulting from defendant's hiring of an attorney to protect his rights are also not legally cognizable, as discussed above. Nevertheless, the harm from the failure to pay rent is enough to show some type of harm resulting from plaintiff's false promise to pay rent in exchange for staying in the home.

However, defendant does not allege when the second promise was made, how it was made, where it was made, or by what means it was conveyed to defendant. The promise appears to have been made separately from the earlier promise to act as the real estate broker, agent and manager for the property, although this is not clear from the allegations of the cross-complaint. Thus, defendant has not sufficiently alleged facts showing how, when, where, and by what means the representations were made, and therefore the claim for promise made without intent to perform is insufficiently pled. The claims for intentional or negligent misrepresentation and concealment are also insufficiently pled, as defendant has not alleged how plaintiff's misrepresentations harmed him. Therefore, the court intends to sustain the demurrer to the second cause of action with leave to amend, for failure to state facts sufficient to constitute a cause of action and uncertainty.

Third Cause of Action: Defendant attempts to state a claim for general negligence, alleging that, if plaintiff's conduct alleged in the second cause of action was not intentional, then it was negligent. (Cross-Complaint, p. 6, ¶ GN-1.) Plaintiff did not know the law in connection with the duties of real estate agents and brokers in regard to representing defendant in the purchases and sales of real estate, and in connection with the management of real estate. (*Ibid*.) In particular, plaintiff was negligent in the conduct of her agency for defendant, thus causing financial injury to defendant "in an amount to be proven." (*Ibid*.)

However, these allegations do not state any facts that would support a negligence claim. The elements of a negligence cause of action are (1) a duty on the part of defendant toward plaintiff, (2) breach of that duty, and (3) defendant's breach proximately caused damages to plaintiff. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 673.)

Here, defendant alleges that plaintiff was negligent in failing to know the law in connection with her duties as a real estate broker, agent, and property manager, and that her conduct caused financial injury to defendant. However, he alleges no facts to support the claimed causal link between plaintiff's negligent failure to know the law and carry out her duties as a real estate broker and agent, and the resulting harm to defendant. Defendant also fails to specify what damage he suffered as a result of plaintiff's negligence. The other allegations of the second cause of action, which appear to be incorporated into the third cause of action, do not assist defendant, as they do not show any harm to defendant from plaintiff's acts as an agent, broker, or property manager. The only actual harm alleged in the second cause of action is the failure to pay rent as a tenant, which does not appear to be connected to plaintiff's duties as an agent, broker, or manager. Defendant does allege that plaintiff "may have done damage to his house", but this allegation appears to be merely speculative.

Therefore, defendant has not alleged any facts to show proximate cause or resulting harm to defendant, and the negligence cause of action is insufficiently pled. Consequently, the court intends to sustain the demurrer to the third cause of action for failure to state facts sufficient to constitute a cause of action and uncertainty, with leave to amend.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 12-16-13.
(Judge's initials) (Date)